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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 628

FISHER'S BLEND STATION, INC.,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLEES.

G. W. HAMILTON,
Attorney General;
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Counsel for Appellees.

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BRIEF OF APPELLEES.

Statement of the Case.

The Supreme Court of the State of Washington sustained the Washington State Occupation tax (Chapter 191, Laws of 1933), as applied to the gross amount realized by appellants from the performance of contracts for the use of the broadcasting facilities owned and operated by it in the State of Washington. (R. 37.)

The court held that the tax involved was not a license fee, the payment of which was a prerequisite to the right to engage in business (R. 27), and held that the tax was based upon a business which was purely intrastate, wholly completed within the State and prior to and regardless of any interstate activity (R. 36).

Notwithstanding this holding, appellant now argues that the tax should have been held invalid as, first, being imposed on gross receipts from interstate commerce and, secondly, as being an attempt to condition appellant's right to engage in interstate commerce upon the payment of the tax.

The record shows that appellant's revenues are realized from the use of its broadcasting facilities situated in the City of Seattle, Washington. (R. 21.)

A close analysis of the business actually transacted by the radio stations which appellant operates will show that the tax as sustained by the State court is not based upon receipts realized from interstate activities but upon contracts locally performed and independent of anything in the nature of an interstate carriage or transaction.

Appellant's Business in Its Nature is Purely Local.

Appellant operates, under Federal license, two commercial broadcasting stations. Each of these stations is equipped with electric apparatus which can and does create an electrical disturbance in air which is analogous to waves in water. These radio waves are referred to as carrier waves as they will carry any program which may be superimposed on them by use of the apparatus in the radio station.

The waves continue to travel in space.

Any program which may have been superimposed upon the waves will be carried by the waves.

The program is not audible and may be detected only by means of a receiving apparatus or a radio set which, properly tuned, may take the program off of the radio wave, translate it into sound and amplify that sound so that the program may be heard.

The receiving set is, of course, not controlled in any way by the broadcasting station.

The distance at which the program may be heard depends upon the limitations of the receiving set rather than the power of the station which generates the carrier waves.

Appellant's license must be distinguished from a point to point license, which would authorize the licensee to transmit a message by wireless from a certain person to a certain person and to make a charge for the carriage of the message. Such a charge, being based upon a carriage or transmission of a message is subject to regulation by the proper Federal authorities as being based upon an interstate activity.

However, appellant is not licensed to carry messages or communications and its equipment is not such that it is possible for it to transmit communications to a certain person at a certain point. Appellant's license is simply for broadcasting. Radio waves are generated and programs placed upon them as a condition of the license in order to create and sustain public interest. Whether or not such programs are received depends upon conditions without the control of the transmitting station.

Appellant's receipts are realized from such contracts as it may make with advertisers to announce such advertisers as "sponsors" of the program. The exact nature of these contracts will be discussed later.

The charge which appellant makes to such advertisers is not a charge for the carriage or transmission of a message to a point or a person and is, therefore, not subject to regulation by Federal authorities (nor indeed to regulation by any authority).

Reference to the case of *Sta-Shine Products Co.* v. *Station WGBB*, 188 I. C. C. 271, will disclose an accurate description of the business transacted by a broadcasting company as distinguished from a wireless company operating under a point to point or person to person license.

In the *Sta-Shine Products Co.* case a certain corporation engaged in the sale of a liquid polish complained to the Interstate Commerce Commission that the advertising rates charged by the broadcasting company were unreasonable and unjust and in violation of Sections 1 and 3 of the Interstate Commerce Act.

The charges were brought under an Act which applied to common carriers engaged in the transmission of intelligence by wire or wireless for hire.

Defendants denied that they were common carriers or subject to the provisions of the Act.

In passing upon the question, the Commission correctly said that it was concerned merely with the accomplished broadcast *in its commercial aspects.* It said that defendants broadcasted two types of programs, sustaining and sponsored.

Sustaining programs are broadcasted at the expense of the broadcasting station to create general interest in its broadcasts and thus give them advertising value.

Sponsored programs are paid for by advertisers and such payments are the sources of a broadcasting station's revenues.

In explaining the business conducted, the Commission went on to say that the sponsor or advertiser might make up his own program and use artists of his own selection or the broadcasting company might create the programs and furnish the artists. (This is a matter of private contract.)

The Radio Commission has held that it was only concerned with the licensing of such stations and it had no jurisdiction over the charges of radio broadcasting companies to advertisers. It thus separated the non-commercial production of radio waves, over which the commission had licensing and regulatory jurisdiction, from the commercial aspect thereof over which it had no jurisdiction at all.

The advertiser then filed a complaint with the Interstate Commerce Commission in the *Sta-Shine Products* case. The radio station contended that the Interstate Commerce Act contemplated only point to point communication by wireless or the transmission of a message from a definite sender to a definite receiver for pay and that it had neither the authority, license nor equipment to do so.

The broadcasting company further contended that its business was essentially one of advertising, much the same in character as that of a newspaper or magazine, and that its advertising is done under private contract and only for such clientele as it wished to serve.

The Commission sustained this contention and in doing so said:

> "The defendants sell 'time' to the public, the program is put on the air, and then the broadcaster, having performed his contract, is finished. No service is performed at the receiving end of the broadcasting company, similar to the service performed by common carriers in the general transmission of messages."

It will be seen that the broadcasting company not only was not a "common carrier" but it was not a carrier at all.

Appellant's Revenues are Realized Solely from Charges Made for the Use of Local Facilities.

In the case at Bar, appellant also realizes its revenues from the sale of "time" (R. 20).

This is amplified by the stipulated facts that the revenues arise from the *use* of appellant's broadcasting facilities in broadcasting programs (R. 21).

This use might be by the National Broadcasting Company or a private firm or corporation. In any event, appellant is paid for the use of its facilities according to the time such facilities are so used.

In the event a chain broadcasting company wishes to use appellant's facilities, a program is brought to appellant's station by wire leased for that purpose and appellant is paid for the use of its facilities.

On the other hand, if appellant has not sold any of its time, it must cause a sustaining program, from which it receives no collateral revenue to be placed on the air.

In the event this program is bought from a chain broadcasting company, it is transmitted to appellant's studio by wire.

The point is that appellant not being engaged in the transmission of intelligence or the carrying of any communication or message *must obtain the services of a telephone or telegraph company which does carry messages and which is engaged in interstate commerce,* if it wishes to get a program to another station.

Appellant, unlike the telephone company, simply creates radio waves and sells the use of its apparatus to persons who may wish to place programs upon these waves.

Appellant's business begins and ends within the State of Washington. Its revenues are, therefore, entirely earned within the State of Washington and this regardless of whether the program is ever received or not. Appellant is entitled to pay for the use of its facilities for that period of "time" for which its facilities were available whether used or not.

It might be stated that the record in this case shows that the revenues upon which the occupational tax is based are derived from the use of appellant's facilities alone and not from any carriage of a message or transmission of a message (R. 21.)

The radio station sells "time" during which time the advertiser who pays may furnish his own program or ap-

pellant could and does sell "time" during which time the broadcasting station will furnish the talent.

In the latter event, the compensation will, of course, include a charge for the talent furnished and this charge will doubtless vary according to the character of the talent. In any event, it is a matter of private contract between appellant and advertiser.

Counsel for appellant have objected to the use of the word "lease". In the opinion of the Supreme Court of the State that word was used in the sense of its being synonymous with "use". The stipulated facts in this record were prepared by counsel for appellant using the word "use".

It was contended below and is admitted here that appellant does not lease its stations in the sense of turning over control of them to anyone else but that it does sell time, which entitles advertisers to the use of plaintiff's facilities.

In appellant's brief, counsel does not discuss the meaning of the word use or the exact nature of the business which appellant conducts. In order that there be no misunderstanding, a very definite illustration of appellant's business will now be given.

One instance of the business conducted by broadcasting stations similar to those operated by appellant is offered by the case of *Pearce* v. *Puget Sound Broadcasting Co.*, 170 Wash. 472.

In that case, the owner of the broadcasting station contracted with Mr. and Mrs. Pearce to allow them the use of their broadcasting facilities for one-half hour each morning for a period of one year for the sum of $200 per month.

The Supreme Court of Washington in the *Pearce* case referred to the payment as a "rental" and this description of the payment led to the use of the word "lease" in the case at Bar. However, the exact facts were that the operators of the broadcasting station at all times operated the stations themselves. The contract simply provided that

for one-half hour each morning the Pearces could speak into the microphone and thereby place upon the carrier waves created by the operation of the station a program arranged by themselves.

The radio station operators having failed to perform the contract by refusing to furnish their facilities to the Pearces, a suit for damage followed in the State Court. The Pearces recovered damages for breach of this contract.

It is important to note that the contract would have been performed by the broadcasting station if it had made the broadcasting facilities available for the allotted time whether or not the Pearces themselves used the facilities and whether or not programs placed upon the carrier waves by the Pearces were ever transmitted into sound by receiving sets.

It was the execution of such a contract that the Supreme Court of the State of Washington found to be business and it was the proceeds of such a contract that the Supreme Court held to be a proper basis for the computation of the business tax involved in this case. (R. 37.)

Now, in the *Pearce* case, Mr. and Mrs. Pearce themselves were in the radio advertising business (170 Wash., at page 473)—that is Mr. and Mrs. Pearce made the contracts with the local concerns who wished their products advertised.

As the Pearces had contracted to use the broadcasting facilities for a definite sum, they were entitled to keep the difference between the monies they received and that sum.

The radio station sought to break this contract by refusing the Pearces "time" on their Seattle station and tendering them "time" on a Tacoma station, Tacoma being a city some forty miles from Seattle. This was not acceptable to the Pearces as Seattle advertisers would have no use for "time" over a Tacoma station. (170 Wash., p. 478.)

The Pearces were finally forced to procure "time" from KJR, another broadcasting station in Seattle now operated

by appellant. This "time" was paid for by giving KJR one-half of the gross proceeds realized by the Pearces from their advertising contracts.

Ordinarily, the broadcasting station itself wishes to make all of the profits derived from these advertising contracts and it, therefore, makes these contracts directly with the different merchants and furnishes the talent comprising the program. In any event, the contract is performed when the talent so furnished uses the facilities of the broadcasting station.

The performance of this contract does not depend upon the transmission of the program to a properly tuned radio set. The money is earned as soon as the facilities and (if talent is sold) the talent is made available. It was the performance of such a contract, which precedes any transmission, which the Supreme Court of the State held the taxes applied to.

Another typical example of the business transacted by a broadcasting station is the sale of "time" to a candidate for public office. The candidate is charged a fixed sum for the opportunity of using the facilities for a certain length of time. In other words, he may speak in a transmitter and thereby place upon the carrier waves created by the carrier set a message which he hopes will reach local listeners, the time of his broadcast having been announced by newspapers, etc. The contract of the broadcasting station is performed when it furnishes the candidate with the opportunity of so speaking.

We have seen that broadcasting stations have likened themselves to newspapers and this is supported by technical writers. (2 George Washington Law Review, p. 14.)

But radio broadcasting has been more aptly likened to a band concert on one side of a State line being enjoyed by the public on the other side. (26 Mich. L. Rev., p. 921.)

The writer of the above article concluded that the State in which the band was playing could regulate the time and place of the playing without interfering with interstate commerce.

While the comparison of radio broadcasting to a free band concert is accurate, it must be remembered that radio waves are not audible unless they are detected and translated into audible sound waves by another complicated apparatus called a receiving set. The original program is not heard and the reproduction thereof by a receiving apparatus is a performance. *Buck* v. *Jewell-La Salle Realty Co.*, 283 U. S. p. 200.

It is obvious from the foregoing analysis that the actual creation of radio carrier waves which transcend interstate lines is non-commercial for the broadcasting station is required to do that as a condition for receiving the license. In fulfilling these conditions the broadcasting station broadcasts sustaining programs or programs at its own expense.

The commercial or business aspect appears for the first time when the radio station by a contract receives money for the use of its local facilities. (Harvard Law Review, Jan., 1936, at page 476.)

It is the gross amount received from this commercial and local aspect of appellant's activities which the Supreme Court of the State held to be subject to the occupation tax. (R. 37.)

We have seen that neither the Federal Radio Commission nor the Interstate Commerce Commission regulated the commercial business. (*Sta-Shine Products Co.* v. *Station WGBB*, 188 I. C. C. 271.) Therefore, the tax in the case at bar is imposed on a business which is not even regulated by Federal authority.

Since the holding in the *Sta-Shine Products* case Congress has passed the Federal Communications Act of 1934.

48 Stat. 1064, 47 U. S. C. A., 1064, 47 U. S. C. A., Section 151.

In this Act, Congress made a distinction in the commercial sense between point to point radio communication and radio broadcasting. The former licensee is classed as a common carrier and the latter is specifically excluded.

Title 47 U. S. C. A., Section 153, Subdivision (h) defines the term "common carrier" as including communication by radio with the following specific proviso:

> "But a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

The distinction is obvious. A wireless station which trahsmits a message for a fee placed upon such transmission is a carrier engaged in interstate commerce. *Marconi Wireless Telegraph Co.* v. *Commonwealth,* 106 N. E., at page 314.

A broadcasting station, however, simply makes charges for the use of local facilities. A broadcasting station neither owns nor controls property in other States as do telephone and telegraph companies, nor does it contract to contact any specific receiving set as does a wireless telegraph company.

Congress, therefore, refused to regulate in any way the commercial business of broadcasting stations as this was entirely intrastate. Title 3 of the Radio Communications Act of 1934 contains special provisions relating to radio.

The powers and duties of the Commission are limited to the classification and licensing of the stations, the making of regulations necessary to prevent interference, etc.

The Commission is specifically given authority to require illumination of radio towers *if, in its judgment, such towers may constitute a menace to air navigation.*

It will be seen that Congress specifically disclaimed any regulatory power over the rates, charges and other aspects

of the business conducted by broadcasting stations. It should follow logically, therefore, that a tax upon the rates which are the gross proceeds of the business does not affect commerce or contravene any Federal regulation. This was the conclusion of the court below.

The Taxing Act was Construed by the State Court as Neither a License Fee Nor a Regulatory Measure But an Excise for Revenue.

In order to properly classify the cases cited, it is necessary not only to have an accurate conception of the basic facts constituting the business to be taxed but an accurate conception of the taxing statute itself. This Court will accept the ruling of the Supreme Court of the State as to the construction and application of a State statute. *Osborne* v. *Florida,* 164 U. S., page 650.

Ch. 191, Laws of 1933, is not a regulatory measure but is a tax levied for revenue. (R. 27.) This has been the consistent holding of the Supreme Court of the State of Washington. A similar statute was so construed in *Pacific Telephone Co.* v. *Seattle,* 172 Wash. 649 (R. 27).

Neither is it a licensing tax imposed as a prerequisite to entering into business. *Ranier National Park Co.* v. *Henneford,* 45 Pac. (2d) 617. No. 541, October Term, 1935. Certiorari denied December 9, 1935.

Again, in the last cited case the Supreme Court of the State said that the taxing act here involved was not for the regulation of business but solely for revenue purposes.

Accordingly, in the case at bar the Supreme Court of the State held "payment of the tax is not a prerequisite to the right to engage in business, save insofar as process to enforce payment of a delinquent tax might interfere with the taxpayers' affairs."

The Taxing Act here involved is applied to commercial business. *State ex rel. Steiner* v. *Yelle*, 174 Wash. 402, at page 408.

The tax is laid upon all persons engaged in intrastate business and is measured by income solely from that business. It does not purport to tax the privilege of doing interstate business. It is moderate in amount and is not a disguised attempt to discriminate against interstate business.

Pacific Tel. & Telg. Co. v. *Tax Com'n of Washington*, 84 Wash. Dec. 52, 66; affirmed Nos. 529, 544, 573, March 2, 1936.

The word "business" is defined in the Act as including all activities engaged in with the object of gain (R., Appendix 2).

The "business", therefore, within the statutory definition in which appellant is engaged is the sale of "time" during which a person may "use" its facilities as that is the only remunerative activity indulged in a radio station owner. This application of the taxing statute to the facts in the case at bar is made very plain by the Supreme Court in the opinion below where the Court held that the State might levy the tax computed upon the gross amount received for the use of its facilities (R. 37).

ARGUMENT.

Counsel for appellant place undue emphasis on the fact that at certain places in its opinion, the Supreme Court of the State of Washington used the word "lease" as meaning the sale of the right to use local facilities, the facilities being at all times under appellant's control and management.

The Record does show that the receipts sought to be reached by this tax are realized from the use of facilities

within the State of Washington, which use must necessarily be local.

Counsel have also overlooked the fact that the State Supreme Court has held that payment of the tax is not a prerequisite to the right to engage in any kind of business.

This Court will look to the basic facts and will not be concerned with technicalities.

The Taxing Act as Construed and Applied Does Not Materially or Directly Affect Interstate Business.

Without analysis, counsel have cited a long list of cases in support of the contention that appellant is engaged in interstate commerce. (Appellant's brief, page 18.)

Most of those cases simply sustain the right of the Radio Commission to license broadcasting stations and to regulate the right to create radio waves by assigning bands of frequency, etc. This right is not disputed. It is not the business from which appellant receives remuneration.

We have in this case a taxing act which does not seek to regulate and which reaches only a business entirely completed locally and independent of any interstate aspect.

Such of appellant's cases as involved a species of tax will be briefly noted.

Whitehurst v. *Grimes*, 21 (2d) 787 involved a municipal ordinance sought to be applied to an amateur radio operator who had a license from the Federal Government.

The ordinance was construed as imposing a license fee as a prerequisite to the right to operate and it was, therefore, held to be void as the amateur operator was already licensed by the Federal Government.

The ordinance requiring this license as a prerequisite to broadcasting was quite different from the Taxing Act in the case at bar, which applies only to the receipts of a busi-

ness already being conducted when and if such receipts are realized. Moreover, the licensing ordinance in the *Whitehurst* case was sought to be applied on an amateur operator who actually communicated by means of his instrument and who was not engaged in a commercial business. The case is, therefore, not in point either on the facts or the law.

Station WBT, Inc., v. *Poulnot*, 46 F. (2d) 671, involved a tax which was construed by the Court as a tax for the privilege of owning or operating a receiving set.

It will be seen at once that this was not a tax similar to the one at bar nor was there any business involved in the case.

The *Poulnot* case might be authority for holding that a tax levied on the privilege of owning or using a transmitting set would be invalid.

But the State of Washington did not enact such a tax. It expressly enacted a business tax and measured the tax on the proceeds of the business, with the proceeds of which Congress has refused to interfere. The distinction is obvious.

If we were to assume a state of facts similar to the one in the case at bar and picture the owner of a receiving set establishing something in the nature of a theatre and charging admission, we would then have the owner of that receiving set engaging in a business.

Undoubtedly any interstate aspect terminated upon receipt of the program in the receiving apparatus and the business of selling admission to hear the program would be entirely local.

Browning v. *City of Waycross*, 233 U. S. 16.

North American Service Co. v. *A. T. Vick Co.*, 243 S. W. 549.

Of course, such a business would then be subject to a business or occupational tax similar to the one in the case

at bar not levied as a license but as an excise based upon the engagement in the local business or the privilege of doing so. In the case just assumed any transportation or interstate carriage would have ceased and the effect of an occupational tax based upon the conduct of the local business would be too remote to be a burden on any interstate transportation.

In the case at bar, the local business precedes any interstate transportation of a program and the occupational tax levied not upon the transportation but upon the business which precedes it is likewise too remote to offend against the commerce clause.

Cases Involving Occupational Taxes Hold that the Occupation of Radio Broadcasting is Local and that Such Taxes Do Not Offend Against the Commercial Clause.

Two cases have been cited by counsel for appellant in which occupational taxes similar to the tax in the case at bar were involved and where radio broadcasting stations protested against this tax.

The case of *KVL Inc.*, v. *The Tax Commission of Washington*, 12 Fed. Supp. 497, should first be noticed. This case involved an application for a preliminary injunction based only upon a showing in affidavit form by appellant. Respondent did not answer and simply challenged the jurisdiction of the Court by motion to dismiss. The lower Court found that it had jurisdiction and found probable cause for granting a temporary injunction on the application of the complainant. The case has not yet been heard on the merits and the Court did not, therefore, have occasion to pass upon the nature of the broadcasting business or the nature of the tax other than to hold that a cause of action was stated.

The Taxing Act involved in the KVL case has not been construed or applied to the radio business by the Supreme Court of the State.

The Taxing Act in the case at bar has been construed and applied to the local commercial business of selling "time" only. This construction will be accepted here.

There remains but one other case involving an occupational tax similar to the one in the case at bar sought to be levied upon the business aspect of radio broadcasting.

City of Atlanta v. *Oglethorpe University* was decided by the Supreme Court of the State of Georgia on February 14, 1934. The decision is reported in 178 Ga. 379, 173 S. E. 110.

Motion for rehearing was denied (173 S. E. 112). The case was then tried on the merits with the result that the tax was sustained and held to be constitutional. On January 21, 1935, the Supreme Court of Georgia adhered to its former ruling and sustained the tax as applied to broadcasting stations.

The case was thereafter appealed to this Court where it was No. 713 October term 1934. This Court noted probable jurisdiction, but the case was voluntarily dismissed by appellant on April 8, 1935.

The very question involved in the present case was before the Supreme Court of Georgia and that Court like the Supreme Court of Washington in the instant case, considered the nature of the business from which radio broadcasting stations realized profits and found it wholly intrastate and therefore taxable.

The Court pointed out that there was no evidence of a transmission of messages and that is the admitted fact in the case at bar, where the only facts are that the radio stations receive a consideration for the use of local facilities.

The Supreme Court of the State of Washington in the case at bar concurred with the reasoning of the Supreme Court of Georgia and said:

> "Respondent completes its contract and earns its compensation regardless of whether five stations or five thousand receive the message. In this connection, the holding of the Supreme Court of Georgia in the case of *City of Atlanta* v. *Oglethorpe University, supra,* is in point, and we agree with that court in holding that, as a practical proposition, broadcasting similar to that with which we are here concerned is an intrastate business, considered in connection with such a tax as is here in question."

Commentators are of the Opinion that a State Occupation Tax Based on the Business of Radio Broadcasting is Valid.

Mr. J. Warren Wright, of the Radio Division, Bureau of Engineering, Navy Department, Washington, D. C., and a member of the Bar of the District of Columbia, has a most instructive article in the George Washington Law Review, Vol. 2, at page 13.

Mr. Wright reasoning from the case of the *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 185, said:

> "• • • *It would appear that property, corporation, manufacturing or occupation taxes might be applied by the several States to the business of radio communication or broadcasting so long as such taxes are not levied against the transmission itself.* Seemingly, this last form of taxation was held invalid in the case of *Whitehurst* v. *Grimes* (21 F. (2d) 787) in which a district court passed on the validity of a municipal ordinance requiring a license to engage in the business of amateur or commercial radio communication. In that case, the court appears to have considered that the municipality was attempting to regulate a Federal matter already covered by the Radio Act

of 1927. When the case of *Whitehurst* v. *Grimes* is compared with the Power cases and all are considered in the light of the actual fact situations of radio, *it is submitted that radio generation and transmission which occur almost simultaneously, should also be considered in law to be separable and subject to the legal reasoning applied in the Power cases.*

"If this view is adopted and applied to regulation as well as taxation, the State in which a radio station is located would have jurisdiction for the purpose of taxing and regulating *those phases of the process of generation which are of a local nature.*" (Italics ours.)

In the case at bar the State does not seek to regulate any phase of the local process of generation of radio waves, but simply seeks to apply an occupational tax to a local business in which radio stations have been enabled to engage by virtue of the fact that they do generate radio waves as a condition of their license and for their own benefit.

Mr. Wright's knowledge of the technical process of radio broadcasting makes his opinion of value. In it, he points out the difference between a tax such as the one in the case at bar levied against a local business, which he thinks valid, and a license or regulatory tax which the Court held invalid in the case of *Whitehurst* v. *Grimes* relied upon by counsel for appellant.

A well reasoned article appears in the Harvard Law Review for January, 1936, Vol. XLIX, No. 3, at page 473. In this article, the commentator considers the exact nature of the business of radio broadcasting and makes the obvious distinction between the non-commercial transmission of radio waves which is regulated by the Federal Government and the local business which the State would have the power to tax. The production of a program is likened to the manufacture which precedes transmission and it was said "* * * the mere physical peculiarity of simultaneous manufacture and transmission incident to broadcasting should not deprive the States of the right to tax".

An excellent example of a similar business which is very evidently entirely intrastate is given in this article. The writer assumes the maintenance of a Neon sign board near a State line so that ideas would be carried by light waves to a person in another State. Light waves have shorter wave lengths than radio waves but both are contained in the same ether (6 Fortune 37, 33).

The writer of the articles says that the business of maintaining such a sign board might well be said to involve commercial activity only in the State where the sign board is maintained.

The writer in the Michigan Law Review, Vol. 26, p. 921, who likened broadcasting to a free band concert on one side of a State line which could be enjoyed by the public on the other side was of the opinion that the State in which the band was located could regulate the activities of the band without offending the commerce clause. Indeed, this conclusion would seem to be inescapable.

Now, if we were to assume that an advertiser in the State where the band was playing paid the leader of that band a sum of money for holding up an advertising placard or orally announcing advertising matter, would not such a contract entirely performed within the State be a local matter?

It is submitted that the radio station derives its only proceeds from such advertising contracts which constitute a local business subject to State taxation.

Cases Involving Occupation Tax Applied to Analogous Businesses Also Sustain the Conclusion that the Occupation Tax in the Case at Bar Does Not Contravene the Commerce Law.

In *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, this Court sustained a State license on electricity produced at a point within the State but which was transmitted therefrom and sold to consumers in another State. The generation,

transmission and distribution of the electricity was a continuous and direct process accomplished without appreciable lapse of time. The tax was sustained by this Court, notwithstanding the fact that it was necessary to measure the electricity delivered at the meters in the foreign State.

The Court so construed the State statute as to sustain it. It divided the almost simultaneous operation of the production and transmission of electricity into two parts—manufacture and transmission—and held that the tax was valid as applied only to the local process of manufacture.

In the case at bar, the Supreme Court of the State has construed this act as applied only to the making and performing of local contracts for the use of local apparatus. Insofar as applicant manufactures a program, the receipts from this manufacture certainly precede any transmission of radio waves and the tax in the case at bar, construed as it has been is sustainable under the doctrine of the *Utah Power Co.* v. *Pfost* case.

The marked similarity between the production and transmission of electricity and radio waves was explained in the article by Mr. Wright, reported in 2 George Washington Law Review, at page 17.

The writer in the Harvard Law Review for January, 1936, referring to the reasoning in the *Utah Power & Light Co.* v. *Pfost* case, also says:

> "A mechanical application of this reasoning would allow, concurrently with Federal regulation of Radio Transmission as interstate commerce, State taxation of the manufacture of radio waves since as much separation between manufacture and transmission exists in the conversion of electric power into radio energy as in the conversion of water power into electric energy" (p. 478).

The doctrine of *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, that a tax levied on the manufacture of the energy

is not a direct burden on interstate commerce and is therefore valid, was reaffirmed and extended in *Broad River Power Co.* v. *Query*, 288 U. S. 178.

As these technical writers have pointed out, if we treat the business of the radio broadcasting company as the manufacture of electric energy and the sale thereof to a recipient or consumer in another State, there is enough separation between antecedent manufacture and the following transmission to justify the levying of a State tax on the manufacturer as distinguished from the transmission.

But the case for the validity of the occupational tax as construed and levied by the Supreme Court of the State of Washington is much stronger.

For the contract is not to sell the electric energy or to sell anything to anyone in another State. The radio station, as we have seen, furnishes the electric energy without charge as a prerequisite to maintaining public interest under its license and in order to create an advertising value.

Using the word business in the sense of the Taxing Act as meaning a commercial activity engaged in with the object of gain, the business of the radio station is limited to the making and performance of contracts with advertisers for the use of local facilities which are generating the electrical impulses any way.

The performance of that contract is collateral to the manufacture and the transmission of the electrical impulses which would go on any way, so that it is not necessary in the case at bar for the Court to make the distinction it did in the *Utah Power & Light Co.* v. *Pfost* case, in order to separate the intrastate from the interstate aspects.

The fact that the broadcasting company is enabled to make a little money locally from the performance of contracts whereby for given periods of time advertisers may use the local facilities does not to any extent burden or hinder the transmission of the radio waves.

In order to illustrate the fact that the tax in the case at bar does not bear directly on any interstate activity, we may assume a source of revenue one step further removed from that activity. Assume that the broadcasting station having an up-to-date studio adopted a policy of charging admission to people who wished to examine the studio or perhaps to listen to the artists who use the facilities and make up the sponsored program.

Certainly, the business of charging admission is at least two degrees removed from the actual transmission of radio waves and a tax levied upon that business would certainly not affect that interstate transmission.

Many illustrations might be given of businesses which precede transmission in interstate commerce and which, therefore, may be taxed by the State.

It is submitted that the business of owning and operating an interstate bridge affords an analogy.

In the case of *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board of Michigan*, 294 U. S. 83, this Court following *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, upheld a State tax on a company operating a bridge between two States upon the ground that the company which operated the bridge was not engaged in an interstate activity and that only persons who used the bridge were so engaged.

The *Detroit Bridge Co.* case involved a privilege tax. This Court in sustaining that sort of a tax as levied against the privilege of exercising the corporate business and as measured upon the paid up capital and surplus, relied upon the following quotation from the *Henderson Bridge Company* case:

> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business.

> That business was carried on by the persons and company which paid the bridge company tolls for the privilege of using the bridge."

Applying that analogy to the case at bar we have appellant constantly maintaining an apparatus creating radio waves. It receives money (in the nature of tolls) for allowing people to use that apparatus. It is true that the equipment of the radio station is constantly controlled and operated by the radio company but so is the bridge operated, maintained and controlled by the bridge company. In each case the company realizes receipts for the privilege of allowing people to use the equipment so operated and maintained. In the one case, it is the bridge—in the other a broadcasting station.

The Record in the case at bar shows the receipts upon which the State tax is to be applied and to which the tax is limited are derived solely from this use of its facilities.

The reasoning by which the Court sustained the tax involved in the *Detroit International Bridge* case, 294 U. S. 83, and the *Henderson Bridge Co.* case, 166 U. S. 150, requires the sustaining of the tax at bar.

In the *Henderson Bridge Company* case, the State tax was measured by gross receipts. It was sustained notwithstanding the fact that payment of the tax might be supposed to increase the rate of tolls charged to the users of the bridge. This Court said that such an effect was too remote and incidental to make any tax on the bridge company's business invalid.

It must be remembered that in the case of the bridge, the tolls are regulated by Federal authorities but that in the case of the radio station the charges made by the radio station to persons using its apparatus are not subject to regulation either State or Federal, it being in the nature of a local advertising business.

It must be remembered that the stipulated facts in this case are that appellant's only revenues are received from the "use" of its local facilities and that, therefore, the facts of this case are exactly similar to the facts in the bridge case. However, in the case at bar we have seen that the local facilities might be used by (a) either by the advertiser himself or (b) by the talent selected either by the advertiser or by the broadcasting station.

(a) If the advertiser or the political candidate speaks into the microphone, he is using the facilities and broadcasting a message. The analogy here between the bridge cases and this type of use of the radio facilities is complete. The receipts from this type of use are, therefore, taxable as are the tolls for the use of the bridge.

The type of arrangement illustrated in the case of *Pearce* v. *Puget Sound Broadcasting Co.*, 170 Wash. 472, whereby Pearce broadcasted an advertising program which he himself had arranged, paying the station a "toll" or charge for the "use" of the station for one-half hour each day would fall into this class.

However, the broadcasting station itself usually desires to make the profit which Pearce derived from arranging the contracts with the advertisers. Therefore, it usually employs persons to solicit the advertising contracts directly with merchants. As a result, the broadcasting company is itself in the identical business (that of soliciting advertising) which Pearce was engaged in.

It is well settled that securing contracts for advertising is not interstate commerce.

To this effect, the holding of this Court in *Blumenstock Bros. Adv. Agency* v. *Curtis Pub. Co.*, 252 U. S. 436, is cited.

In that case this Court held that contracts for magazine advertising, which the defendant publisher had conspired to

monopolize, were not interstate commerce so as to create a liability under the Sherman Act. The Court, of course, recognized the distinction between that business and the actual circulation and distribution of the magazines in which the advertising matter was inserted.

In making the distinction between the business of entering into and performing the contract for advertising and the subsequent distribution and circulation of the advertising medium this Court said:

> "This case is wholly unlike *International Textbook Co.* v. *Pigg,* 217 U. S. 91, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of federal control, and to exempt it from the burden imposed by state legislation. This case is more nearly analogous to such cases as *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1, wherein this court held that a broker engaged in negotiating sales between residents of Tennessee and non-resident merchants of goods situated in another state, was not engaged in interstate commerce; and within that line of cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse. *Paul* v. *Virginia,* 8 Wall. 168; *Hooper* v. *California,* 155 U. S. 648; *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495. We held in *Hopkins* v. *United States,* 171 U. S. 579, that the buying and selling of livestock in the stockyards of a city by members of the stock exchange was not interstate commerce, although most of the livestock was sent from other states. In *Williams* v. *Frears,* 179 U. S. 270, we held that labor agents engaged within the State of Georgia in hiring persons to be employed outside the State were not engaged in Interstate Commerce. In *Ware & Leland* v. *Mobile County,* 209 U. S. 405, we held that brokers tak-

ing orders and transmitting them to other states for the purchase and sale of grain or cotton upon speculation were not engaged in interstate commerce; that such contracts for sale or purchase did not necessarily result in any movement of commodities in interstate traffic, and the contracts were not, therefore, the subjects of interstate commerce. In the recent case of *United States Fidelity & Guaranty Co.* v. *Kentucky*, 231 U. S. 394, we held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the state, was not unconstitutional as a burden upon interstate commerce as applied to a non-resident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the state. • • •

"Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. • • •" (Italics ours.)

Writers in the articles heretofore referred to have likened the receipts from the advertising contracts in the *Blumenstock* case to receipts from advertising contracts entered into by radio broadcasting stations and reasoning from the *Blumenstock* case have concluded that an occupational tax similar to the one at bar levied upon these receipts would be held constitutional as levied only upon intrastate business.

(b) As we have seen, the radio station itself may sell to the advertisers the service of artists, together with the right to use the facilities for certain periods of time, during which periods of time the artists (as agents of the advertiser) use the broadcasting facilities and place programs upon the radio waves.

In so far as the radio station furnishes the services of talent, the business is still further removed from any interstate aspect and certainly that portion of the receipts covering the service of the talent is entirely local. The effect of a tax levied on such receipts would certainly be too remote and incidental to burden any interstate transmission.

It is, of course, well settled that a State may impose a license tax on productive processes carried on within its borders even though all of the products are to be carried into another State for use there and even though the tax must be computed upon the amount of the sales.

American Manufacturing Co. v. *St. Louis,* 250 U. S. 459.

Oliver Iron Co. v. *Lord,* 262 U. S. 172.

In *Hope Natural Gas Company* v. *Hall,* 274 U. S. 284, an "annual privilege tax" based on the gross receipts of the business of producing and transporting natural gas in interstate commerce was sustained.

The tax was construed as being upon the production as distinguished from the transportation and, therefore, this Court found that it was not a tax on gross receipts from interstate commerce.

In *Edelman* v. *Boeing,* 289 U. S. 249, this Court sustained an excise tax on gasoline construed as a tax on the "use" of gasoline within the State. The use was limited to the act of withdrawing the gasoline from storage and placing it in the fuel tanks of airplanes, being flown in interstate commerce. This tax would probably have been held invalid if construed as being imposed on the use of gasoline in interstate commerce under the doctrine of *Helson* v. *Kentucky,* 279 U. S. 245.

In the case at bar the State Court has construed the tax as being upon the "use" of local facilities and as so construed it is not obnoxious to the commerce clause.

Appellant's Argument is Based Upon a Misconception of the Opinion of the State Court and is Not Sustained by the Authorities.

Appellant's first and second points are that the broadcasting business is interstate and foreign commerce and that appellant's gross income is derived therefrom.

In making this argument counsel fails to follow the distinction plainly pointed out by the Supreme Court of the State between the revenues realized from the "use" of local facilities, which were held to be taxable and the process of transmission of radio waves and the furnishing of programs at appellant's own expense, which the Court held to be non-commercial and not taxable.

The State Court said:

> "Insofar as respondent itself uses its stations, it pays no tax, and insofar as it allows others to use them for compensation, it is not engaged in interstate commerce." (R. 37.)

The cases cited by counsel for appellant to the effect that Congress has the power to regulate transmission of radio energy are not authority for limiting the power of the State to impose an occupational tax upon the proceeds realized from advertisers for the use of facilities.

In taxation cases, the question always is, does the tax so directly affect interstate commerce as to amount to a regulation of it?

Stafford v. *Wallace,* 258 U. S. 495.
Swift & Co. v. *U. S.,* 196 U. S. 375.

A State excise tax is valid as levied against the proceeds arising from the use of an interstate bridge (*Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 83) but that State could not regulate the tolls charged (*Covington Bridge Co.* v. *Kentucky,* 154 U. S. 204).

In *Federal Compress Co.* v. *McLean,* 291 U. S. 17, we have an example of a business licensed and regulated by the Federal Government but subject to the payment of an annual privilege tax levied by the State government.

It has been shown that the only case cited by counsel for appellant which involved an occupation tax levied against the business of radio broadcasting and which was tried on the merits, held that the receipts from that business are not realized from interstate commerce.

City of Atlanta v. *Oglethorpe University,* 178 Ga. 379, 173 S. E. 110.

That appellant's gross income is not derived from any interstate activity is readily apparent from the fact that it is necessary to lease a telephone wire to get a program from one station to another where the boadcasting station buys a program from a chain company or the chain company buys the "use" of the local broadcasting facilities for a certain period of time. The only way the program can be conveyed is by having some company which is in the business of interstate commerce carry that program.

The advertising value of each station is local and if it is sought to carry on a national advertising campaign, that must be done by the use of local facilities, the interstate carriage of the program being by wire and not by broadcasting.

The third point argued by appellant is that the State Supreme Court based its holding on the fact that appellant was engaged in the business of leasing its station to advertisers and counsel for appellant argues that this is not correct as appellant does not surrender control of the operation of its broadcasting stations.

This Court will gather the holding of the State Supreme Court from the entire opinion and not from the inadvertent use of the word "lease" in certain places.

The fact is that the word "lease" was used in argument below and in the opinion of the Court, inasmuch as the State Supreme Court in *Pearce* v. *Puget Sound Broadcasting Co.*, 170 Wash. 472, used the word "rental" in describing the monthly sum paid to the broadcasting station in that case for the use of its facilities.

Whatever term is used to describe the gross proceeds realized by appellant from allowing a political candidate to use the broadcasting station's facilities for a certain length of time, the fact remains that the Supreme Court limited this tax to the proceeds from such use.

The stipulated fact was that the proceeds realized by appellant are from the use of its facilities and the Supreme Court of the State limited the application of the tax to monies realized for such use. (R. 37.)

Cases Cited by Appellant Involving Receipts from Interstate Transportation are Not in Point.

Appellant's main argument is that the performance of the contract between the radio broadcasting company and the advertiser is only incidental to the production of the radio waves which are transmitted and that the receipts from the contracts are, therefore, receipts from interstate commerce.

This argument is based upon cases involving the performance of contracts for interstate transportation. In the case at bar, the performance of the contract is completed when (assuming an illustration) the broadcasting facilities are made available to the political candidate for the period of time contracted for.

In the railroad, telephone and telegraph cases cited by appellant the receipts are realized from the actual carrying of passengers or the carrying of messages across State lines. The performance of the contracts in such cases

necessarily involves an interstate journey and the use of interstate facilities.

In the case of the railroad, the entering into the contract in one State may be incidental to the main business, which is interstate transportation. But in the case of the radio station the contract is performed in the State where the facilities are located and this constitutes the entire business. Counsel for appellant cite and rely on *Ozark Pipe Line Corporation* v. *Monier,* 266 U. S. 555, in which the corporation was engaged in the business of piping natural gas through the State. There was, of course, no distinct local business such as the Court found in *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, where this Court sustained a State "gross receipts tax" imposed upon corporations supplying natural gas to consumers.

In the last cited case, the gas was engaged uninterruptedly in an interstate journey from the time it left the source in one State and reached the gas jet in the consumer's home in another State. But the Court pointed out that the gas at some point inside the State of Ohio passed from the main distribution pipe in which it traveled at high pressure and low volume into local supply mains, in which it traveled at reduced pressure and expanded volume.

The Court likened this breaking down of pressure to the opening of an "original package". It therefore held that the business was essentially local and subject to taxation and that the license tax imposed upon such a local business did not affect interstate commerce so directly as to burden it.

It is submitted in the case at bar that the business from which appellant realized its revenues is essentially local and taxable.

Sprout v. *City of South Bend,* 277 U. S. 163, involved the actual business of interstate transportation. This case and

the case of *Cooney* v. *Mountain State Tel. Co.* was distinguished as to the effect of the tax in *Pacific Tel. & Telg. Co.* v. *Tax Com'n of Washington*, Nos. 529, 544 & 573, March 2, 1936.

Cooney v. *Mountain State Telephone Co.*, 294 U. S. 384, involved the business of actually transmitting telephone conversations from a point in one State to a point in another State. It is submitted that the Supreme Court of the State of Washington was correct in distinguishing between the receipts realized from the local business in the case at bar and the receipts realized from interstate transportation involved in the cases cited by appellant.

Appellant's Argument that the Tax is a License Tax and a Prerequisite to the Right to Engage in Business Ignores the Construction of the State Supreme Court.

Appellant argues that the taxing act in the case at bar is a licensing act which attempts to condition appellant's right to engage in interstate commerce upon the payment of the tax.

The State Supreme Court specifically held that payment of this tax was not a prerequisite to the right to engage in business whether that business be intrastate or interstate. (R. 27.)

In construing a similar tax, the Supreme Court of the State of Washington pointed out that the tax was for revenue and not for regulation; that the use of the word "license" was a means of collection, the license being only a receipt for the tax.

Pacific Tel. & Tel. Co. v. *Seattle*, 172 Wash. 654.

This construction and application of the Taxing Act will be accepted by this Court.

Osborne v. *Florida*, 164 U. S. 650.

Mich. v. *Mich. Trust Co.*, 286 U. S. 334.

This construction of the same taxing act was accepted and the act sustained as applied to the intrastate business of a telephone company and two railroad companies.

Pacific Tel. & Telg. Co. et al. v. *Tax Com'n of Washington,* 84 Wash. Dec. 52, 66; Affirmed Nos. 529, 544, & 573, October Term, 1935, decided March 2, 1936.

Conclusion.

In any event, it cannot be argued that the burden of the tax in the case at bar falls directly upon any interstate activity.

Appellant is under the burden of broadcasting a sustaining program at its own expense by virtue of its license. If, therefore, it can by private contract procure advertisers or sponsors to broadcast these programs or pay for their being broadcast, appellant is to that extent relieved of the burden imposed by the license.

It is well settled that a state tax will not be declared invalid unless it is a direct burden on interstate commerce.

Pacific Tel. & Telg. Co. v. *Tax Com'n of Washington,* 84 Wash. Dec. 52, 66; Affd. Nos. 544, 573 & 529, March 2, '36.

In the case of *U. S. Fidelity and Guaranty Co.* v. *Kentucky,* 231 U. S. 394, this Court sustained an occupational tax as imposed on commercial agencies as not being a direct burden on interstate commerce. I quote from page 399:

> *"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case."* (Italics ours.)

It is submitted that the judgment of the Supreme Court of the State of Washington is correct and should be affirmed.

Respectfully submitted,

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